

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

To be argued by
STANLEY SCHAIR

77-4137

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

PETITIONER'S BRIEF

ARANOW BRODSKY BOHLINGER
BENETAR & EINHORN

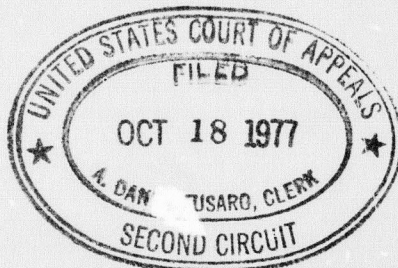
Attorneys for Petitioner

469 Fifth Avenue

New York, New York 10017

Tel. No.: 212 889-1470

DAVID L. BENETAR
STANLEY SCHAIR
ROLAND C. RADICE
EDWARD J. CUMMINGS, JR.
MARK H. LEEDS
Of Counsel





INDEX

	PAGE
Issues Presented	1
Preliminary Statement	2
Statement of the Case	
A. Nature of the Case and Course of Proceedings	5
B. Disposition Below	7
C. The Facts	8
ARGUMENT:	
POINT I—	
The cited OSHA standard, both on its face and as previously interpreted by the Commission in other cases, is inapplicable to the top of a bake oven	11
POINT II—	
The cited standard is impermissibly and unenforceably vague as applied to the bake oven herein	19
POINT III—	
The Secretary has failed to sustain his burden of proving a violation of the cited standard within the six-month limitations period	25
CONCLUSION	29

TABLE OF AUTHORITIES

	PAGE
<i>Cases:</i>	
<i>Allis-Chalmers Corp.</i> , OSHRC Docket No. 5210, CCH 1975-1976 OSHD ¶ 20666 (1976)	15, 17, 19
<i>Arizona Public Co.</i> , OSHRC Docket No. 329, CCH 1971-1973 OSHD ¶ 15131 (1972), <i>aff'd</i> , CCH 1973-1974 OSHD ¶ 16800 (1973)	12, 13, 14
<i>Boyce Motor Lines, Inc. v. United States</i> , 342 U.S. 337 (1952)	20
<i>Brennan v. OSHRC (Gerosa, Inc.)</i> , 491 F.2d 1340 (2d Cir. 1974)	19
<i>Brennan v. OSHRC and Santa Fe Trail Transport Co.</i> , 505 F.2d 869 (10th Cir. 1974)	20
<i>Brennan v. OSHRC and Underhill Construction Corp.</i> , 513 F.2d 1032 (2d Cir. 1975)	27, 28
<i>Brennan v. Smoke-Craft, Inc.</i> , 530 F.2d 843 (9th Cir. 1976)	21
<i>California Rotogravure Co.</i> , OSHRC Docket No. 688, CCH 1974-1975 OSHD ¶ 19240 (1975), <i>petition for review docketed</i> , No. 75-1743 (9th Cir. Mar. 27, 1975)	17
<i>Cape & Vineyard Division v. OSHRC</i> , 512 F.2d 1148 (1st Cir. 1975)	21
<i>Collins v. Kentucky</i> , 234 U.S. 634 (1914)	20
<i>Connally v. General Construction Co.</i> , 269 U.S. 385 (1926)	20
<i>Diamond Roofing Co. v. OSHRC</i> , 528 F.2d 645 (5th Cir. 1976)	22, 23

	PAGE
<i>Fluor Engineers & Construction, Inc.</i> , OSHRC Docket No. 76-77, CCH 1976-1977 OSHD ¶ 20972 (1976)	27
<i>General Electric Company</i> , OSHRC Docket No. 76-2879, CCH 1977-1978 OSHD ¶ 22114 (1977)	16
<i>General Electric Company</i> , OSHRC Docket No. 76-3524, Oct. 3, 1977 (ALJ Weil)	16
<i>General Electric Co. v. Gilbert</i> , 429 U.S. 125 (1976)	19
<i>General Telephone Co. of Ohio</i> , OSHRC Docket No. 3393, CCH 1973-1974 OSHD ¶ 17301 (1974)	26
<i>Grand Union Co.</i> , OSHRC Docket Nos. 7533 and 7031, 20 OSHRC 663, CCH 1975-1976 OSHD ¶ 20107 (1975)	21
<i>Hoffman Construction Co. v. OSHRC</i> , 546 F.2d 281 (1976)	23
<i>International Harvester Co. v. Kentucky</i> , 234 U.S. 216 (1914)	20
<i>Kidets, Inc.</i> , OSHRC Docket No. 2670, CCH 1973-1974 OSHD ¶ 17041 (1973)	17
<i>Langer Roofing & Sheet Metal, Inc. v. Secretary</i> , 524 F.2d 1337 (7th Cir. 1975)	19, 22, 23
<i>McLean Trucking Co. v. OSHRC</i> , 503 F.2d 8 (4th Cir. 1974)	21
<i>Niagara Mohawk Power Corp.</i> , OSHRC Docket No. 76-3325, CCH 1977-1978 OSHD ¶ 21982 (1977)	26
<i>Ryder Truck Lines, Inc. v. Brennan</i> , 497 F.2d 230 (5th Cir. 1974)	21

<i>Secretary v. General Electric Co.</i> , OSHRC Docket No. 2739, 17 OSHRC 49, CCH 1974-1975 OSHD ¶ 19567 (1975), <i>rev'd in part on other grounds</i> , 540 F.2d 67 (2d Cir. 1976)	4, 5, 7, 14, 15, 24, 26
<i>Union Carbide Grafto, Inc.</i> , OSHRC Docket No. 7368, CCH 1974-1975 OSHD ¶ 19531 (1975)	17
<i>United States v. National Dairy Corp.</i> , 372 U.S. 29 (1962)	21
<i>Yelvington Welding Service</i> , OSHRC Docket No. 15958, CCH 1975-1976 OSHD ¶ 20432 (1976) [Commission review ordered February 17, 1976]	26
<i>Statutes and Regulations:</i>	
Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 <i>et seq.</i>	2
9(c), 29 U.S.C. § 658(c)	25
<i>Occupational Safety and Health Regulations:</i>	
29 C.F.R. § 1910.21-1910.32	25
29 C.F.R. § 1910.21(a)(4)	3, 11, 12
29 C.F.R. § 1910.23(c)(1)	<i>passim</i>
29 C.F.R. § 1910.151(b)	20
29 C.F.R. § 1910.500(d)(1)	22
29 C.F.R. § 1926	23
38 F.R. 172, pp. 2430 <i>et seq.</i>	25
41 F.R. 17100	25

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

PETITIONER'S BRIEF

Issues Presented

1. Did the Commission err in holding that the top surface of a bake oven (on which employees are not required to work except on infrequent occasions when the oven's motors are under repair) is a work "platform" requiring a standard railing within the meaning of OSHA's platform guarding standard provided in 29 C.F.R. § 1910.23(c)(1)?

2. Did the Commission's broad construction of the term "platform," as applied to the bake oven herein, meet the due process standards of fair notice and warning in light of the plain meaning of that term and of the practices and common understanding of those working in the industry?

3. Did the Secretary of Labor sustain his burden of establishing a violation of the cited platform guarding standard within the six-month limitations period provided in Section 9(c) of the Act?

Preliminary Statement

This case arose out of an inspection conducted in October 1974 by compliance officers of the Occupational Safety and Health Administration ("OSHA") at the Small AC Motor Department ("SAC") of the General Electric Company¹ in Schenectady, New York.

On November 18, 1974, the Secretary of Labor issued 18 citations for alleged violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*² A timely notice of contest was filed by the Company and the Secretary thereafter issued a complaint to which the Company filed an answer. During a recess in the hearing in this matter before Administrative Law Judge James A. Cronin, Jr., the parties entered into a settlement agreement with respect to all but four of the citations. That settlement was subsequently approved by Judge Cronin.

Among the four remaining citations was citation 8 (6a),³ which in paragraph one alleged a willful and/or repeated violation of 29 C.F.R. § 1910.23(c)(1) based upon the claimed absence of a standard railing around the top surface of a bake oven located in Building 81, Bay C18

¹ Hereafter referred to variously as the "Company" or as "GE."

² Hereafter "the Act."

³ Reference is to the Joint Appendix.

of SAC. It is this alleged violation that is the subject of this appeal.

The Company contends that the top of the bake oven, standing approximately 10 feet 8 inches off the ground, is not a "platform" within the meaning of 29 C.F.R. § 1910.21 (a)(4)⁴ and, therefore, not subject to the railing requirements for platforms contained in § 1910.23(c)(1).⁵

The top of the bake oven was designed exclusively to serve two functions: (1) to enclose or be a roof over the oven and (2) to provide a location for the oven's two motors and associated equipment. Company employees were not required to work on the oven top either to operate the oven itself or to operate any other machinery or equipment. The only instance when the presence of Company personnel was ever required atop the oven was for occasional and infrequent maintenance and repair work on the motors.

Although the Administrative Law Judge ("ALJ") in his decision here expressly recognized the reasonableness of the Company's argument to the contrary (ALJ 24-25, 243a-44a),⁶ he nonetheless felt "constrained" by a prior ruling of the Occupational Safety and Health Review Commission,

⁴ This OSHA standard defines "platform" as:

"A working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment."

⁵ This provision states in pertinent part:

"Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent . . .) on all open sides except where there is an entrance to a ramp, stairway, or fixed ladder . . ."

⁶ Reference is to the Decision and Order of the ALJ and to the Joint Appendix in which it has been reproduced.

which had given the "broadest possible meaning" to the term "platform,"⁷ to rule that the top of the bake oven constituted a "platform" as that word is defined in § 1910.21 (a)(4) (ALJ 25-27, 244a-46a). While the ALJ concluded that the failure to rail the top of the oven was a serious violation, he declined to classify it either as repeated or willful, noting that GE had disputed the applicability of the standard in good faith (ALJ 27, 246a). The Commission affirmed.

The strained and unnatural construction of the word "platform" applied here sharply divided the Commission in other cases involving products (such as huge turbines and transformers) in the process of manufacture and pieces of equipment upon which employees might occasionally work.⁸ Underlying these differences is an employer's right to be fairly apprised of what the OSHA standards require of him and not to be penalized for his failure to comply with what is at best, in the context in which it was here applied, a vague standard interpreted in a manner which is at odds with its plain meaning in the industrial setting. Simple due process requires no less.

Indeed, the extreme liberality and over-breadness of the Commission's views on the application of the Secretary's

⁷ This ruling was made in an earlier GE case involving the failure to provide guardrails around the top of a component part of a product in the process of manufacture on which employees were required to work. *Secretary v. General Electric Co.*, OSHRC Docket No. 2739, 17 OSHRC 49, CCH 1974-1975 OSHD ¶ 19567 (1975), *rev'd in part on other grounds*, 540 F.2d 67 (2d Cir. 1976) (hereafter "*General Electric (1)*"). The precedential value of this holding, we submit, is extremely doubtful in view of subsequent rulings of the Commission and of changes in its membership. See pp. 15-17, *infra*.

⁸ These decisions are discussed at pp. 12-17, *infra*.

platform railing standard has led this Court to remark, in another context, that the "Byzantine pattern of OSHA standards" on the railing of platforms and scaffolds leaves "room for increased clarity of definition." *General Electric (1)*, 540 F.2d at 70, n.2. That increased clarity of definition has not been forthcoming either from the Secretary of Labor in his rule-making capacity or from the Commission in its decisions.

The injustice of foisting an unsupportable interpretation of the platform railing standard on GE is compounded here by the fact that there is no evidence that any employee had worked on the oven top within the six-month statute of limitations period contained in the Act, except on the occasion of the installation of a partial railing installed as a good-faith gesture at the request of the union representing GE's employees. In *General Electric (1)* this Court vacated an OSHA citation alleging a failure to provide guardrails around the perimeter of a powered work platform on the ground that the Secretary failed to prove the platform's use without guardrails during the preceding six months. 540 F.2d at 70.

Statement of the Case

A. Nature of the Case and Course of Proceedings.

A hearing on the contested citations in this case was held before Administrative Law Judge Cronin on various dates in March and April 1975. In addition to the Company and Secretary of Labor, the authorized employee representative, Local 301 of the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, appeared.

On August 6, 1975, Judge Cronin issued his decision and order (220a-53a) affirming two of the four citations which had not been settled by the parties and vacating the remaining two. Penalties of \$500 were assessed for each of the two violations. As earlier stated, while the platform guardrail citation covering the bake oven in SAC Building 81 was one of the citations affirmed, the ALJ refused to classify it either as willful or repeated.

Subsequently, on August 18, 1975, Commissioner Cleary ordered six issues for review by the Commission including the issue of whether the platform guardrail violation was willful and/or repeated. Whether the ALJ erred in finding any violation here of the platform guarding standard (§ 1910.23(c)(1)) was presented to the Commission for review by GE's Petition for Discretionary Review dated August 27, 1975.

On May 19, 1977, the three member Commission issued its decision affirming the ALJ's decision and order below. The Commission's decision,⁹ set forth in three separate opinions, attaches the ALJ's decision and order as Appendix A thereto. GE's Petition For Review of so much of the Commission's decision as held that the Company committed a serious violation of 29 C.F.R. § 1910.23(c)(1) (bake oven) and assessed a \$500.00 penalty in connection therewith was timely filed in this Court on July 18, 1977.

⁹ OSHRC Docket No. 11344, CCH 1977-1978 OSHD ¶ 21853 (1977) reports the full text of the Commission's decision but does not append the ALJ's decision. The text of the ALJ's decision is not reported in full but, instead, is digested at CCH 1975-1976 OSHD ¶ 19907. Both the Commission's and ALJ's decisions, as earlier noted, are reproduced, in full, in the Joint Appendix herein (220a-53a).

B. Disposition Below.

Relying solely on the Commission's earlier decision in *General Electric (1)*, which gave the "broadest possible meaning to the term 'platform,'" the ALJ, as earlier noted, felt "constrained" to hold that the portion of the oven top on which the motors were located constituted a "platform" requiring guardrails under OSHA standard § 1910.23(c)(1) (ALJ 24-26, 243a-45a). He further ruled that, although no employees were observed on top of the oven at the time of the inspection and, with the exception of the installation of the partial railing in August 1974, there was no proof of actual employee exposure to the alleged fall hazard during the six-month period prior to the issuance of the citation on November 18, 1974, potential exposure to the hazard area was "constant" (ALJ 26, 245a).

Commissioners Moran and Cleary restricted their discussion of the bake oven guardrail citation to the question of whether it was willful and/or repeated. Both agreed that the violation could not be classified as willful but divided on the issue of whether it should be deemed as repeated. Chairman Barnako, concurring with Commissioner Moran, found it neither willful nor repeated. He alone addressed the issue of whether the top of the bake oven was a "platform," concluding that Commission precedent supported the ALJ's finding that it was a platform requiring guardrails (RC 10-11, 207a-08a).¹⁰ No discussion of the statute of limitations issue is contained in the Commission's decision.

¹⁰ Reference is to the Commission's decision and to the Joint Appendix in which it is reproduced.

C. The Facts.

As previously noted, the alleged "work platform" cited as a violation of § 1910.23(c)(1) is, in fact, the top or roof of a bake oven standing approximately 10 feet 8 inches above the ground (Citation 8, para. 1, 6a; ALJ 16, 235a). The top of the oven is divided into two steps with the lower step designed solely to serve as a roof over the oven and as the location for the oven's two circulation and exhaust motors (ALJ 25, 244a; Tr. 335-36, 4/23-36, 39a-40a, 179a).¹¹ The top of the oven would be required to enclose it even were the two motors not located there (Tr. 4/23-32, 175a). The citation here relates solely to the Company's failure to provide guardrails around the entire edge of the lower step of the oven top (4/23-36-37, 179a-80a).

The operators of the oven, which is used to bake insulation onto the small AC motors produced by GE's SAC department, are not required to go on top of it to operate the oven itself or any other machinery or equipment (ALJ 25, 244a; Tr. 1000, 4/23-33, 50a, 176a).

The only work ever performed on top of the oven is infrequent and occasional repairs on the two motors located on the lower step (ALJ 16, 25, 235a, 244a; Tr. 331, 35a). The only maintenance employee to testify at the hearing stated that during the past two and one-half years he had occasion to go up on the oven top only four or five times, one of which was to install a section of railing (4/22-134, 158a). Access to the oven's motors was by means of a permanently affixed ladder on the side of the oven (ALJ

¹¹ Reference is to the transcript of the hearing before the ALJ and to the Joint Appendix in which portions of it have been reproduced.

16, 235a). The ALJ concluded that there was no proof that either this or any other employee had worked on top of the bake oven within the six-month period prior to issuance of the citation on November 18, 1974, except on the occasion of the installation of a section of railing in August 1974 (ALJ 26, 245a).

As for the partial railing of the oven top: As a result of a Union safety inspection of SAC conducted on July 21, 1974, the Union on July 22 issued a report referring to an unguarded "catwalk" 10 feet 8 inches above the floor in the Dip and Bake area (ALJ 17, 236a; Exhibit S33, attachment 8a, p. 2). At a subsequent meeting, SAC management responded that, in its opinion, no portion of the oven top was a "catwalk" requiring guardrails (ALJ 17, 236a; Exhibit S33, attachment 8b, part II, p. 3). Thereafter, SAC notified the Union that it would rail, and indeed did rail, the portion of the oven top that could even arguably be considered a "catwalk." SAC management, however, made it clear that this was being done solely as a good faith gesture and not because they considered the oven top a "catwalk" which needed to be railed (ALJ 17, 236a; Tr. 4/21-95, 4/22-100, 85a, 131a; Exhibit S33, attachment 8b, part IV). Upon its reinspection of the area after the railing was installed, the Union appeared satisfied that the top of the bake oven was adequately guarded since it was not included in its reinspection report as a safety violation (RC 10, 207a; ALJ 17-18, 236a-37a).

On the day of the OSHA inspection, the railing had already been installed (Tr. 335, 4/21-182; 39a, 106a).

SAC's determination not to rail the entire oven top was based on its good faith belief that it did not constitute a

"platform," as that term is used in § 1910.23(c)(1), and the OSHA compliance officer believed that this determination by GE was indeed made in good faith (ALJ 18, 237a; Tr. 1036-37, 4/23-34, 71a-72a, 177a). The record evidence further revealed that the Union itself did not view the unguarded portion of the oven top as a "platform" requiring railing under the OSHA standards. While one Union official claimed he had informed SAC of the need to rail the entire exposed edge of the oven top and not just the "catwalk" (Tr. 4/21-96, 86a), he could not explain why this was not included in the Union's reinspection report (Tr. 4/21-180; 104a). In addition, he conceded that the Union's detailed written complaint to SAC concerned *only* the "catwalk" portion of the oven top which was later railed and concerned no other area of the oven top (Tr. 4/21-184, 108a). Indeed, as found by Chairman Barnako, the Union appeared totally satisfied that its complaint had been adequately dealt with by the Company's installation of the railing (RC 12, 209a).

ARGUMENT

POINT I

The cited OSHA standard, both on its face and as previously interpreted by the Commission in other cases, is inapplicable to the top of a bake oven.

OSHA standard § 1910.23(c)(1) requires that standard railings or their equivalent be installed to guard every "platform" 4 feet or more above the adjacent floor or ground level. The term "platform" as used therein is defined in § 1910.21(a)(4) as

"A working space for persons elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment." [Emphasis supplied]

The "work platform" cited in paragraph 1 of OSHA citation 8 (6a) is not a work space from which machinery or equipment is operated. The operators of the bake oven, as earlier discussed, have absolutely no reason whatever to go on top of this piece of equipment. Nor are Company employees required thereon to operate any other piece of equipment or machinery. For, as established by the record evidence, the top of the bake oven was designed not as a work platform but to serve as a cover for the oven and as a location for its two circulation and exhaust motors.

It is undisputed that it is solely for the performance of isolated and infrequent repair or maintenance work on the oven's two motors that any personnel ever have cause to be present in the cited area and, then, only on an irregular or unpredictable schedule.

The Secretary of Labor, in whom the authority both to promulgate and to enforce health and safety standards is vested under the Act, has failed to define "platform" in a manner which reasonably and fairly permits the interpretation he advocates in his enforcement capacity in this case. For in the instant case the Secretary contends that the top of the bake oven is a "platform" merely because it stands at a height of 4 feet or more off the ground and maintenance employees occasionally ascend to the top to make repairs. To the Secretary the mere presence of employees in an elevated area renders it a "work space" or "platform" within the purview of § 1910.23(c)(1), without regard to the nature of the area or the regularity or frequency of employee presence.¹² Presumably, under this interpretation, if an employee climbed on top of a file cabinet to change a light bulb that would render the file cabinet a "work space" or "platform" requiring compliance with the standard railing provisions of § 1910.23(c)(1).

The decision of the ALJ in *Arizona Public Co.*, OSHRC Docket No. 329, CCH 1971-1973 OSHD ¶15131 (1972), *aff'd*, CCH 1973-1974 OSHD ¶16800 (1973), a case involving facts similar to those here, refutes this far-fetched interpretation of the standards. In *Arizona* the Secretary contended that the top of a transformer, to which employees were required to ascend in order to perform occasional maintenance work, was a "platform" within the meaning of § 1910.21(a)(4), thus requiring standard

¹² That the OSHA compliance officers adopted this interpretation in issuing the citation involved herein is clear from their testimony that the partially unguarded top of the oven would be citable under § 1910.23(c)(1) even if only one maintenance employee went up there once every five or ten years (Tr. 1002, 4/22-79, 52a, 128a).

guardrails pursuant to § 1910.23(c)(1). The employer there urged, as GE has here, that such occasional and irregular use of the top of a piece of equipment under repair does not transform it into a "platform."

In upholding the employer's position, the Administrative Law Judge held that "the regulation does not express an intent to prohibit the performance of work that requires some climbing on an article under repair." As noted by the Judge, it would take "a strained and unnatural construction" of the standards to hold that the top of a piece of equipment under repair became a "platform" simply because it was a working space in the sense that work was performed on it.

On review before the Commission, this part of the ALJ's decision was summarily affirmed:

"The Judge's reasoning as regards [the § 1910.23(c) violation] was eminently sound, and we concur in his disposition." [CCH 1973-74 OSHD ¶16800 at p. 21,539]

Here, as in *Arizona*, the area cited is the top of a piece of equipment where only occasional maintenance work is performed. And Judge Cronin here, we submit, should have concluded as the ALJ did in *Arizona*, that the cited standard did not apply. While he did not mention or cite *Arizona*, Judge Cronin appeared to recognize the reasonableness and soundness of the position of the employers both there and in this case when he observed (ALJ 24-25, 243a-44a):

"It *reasonably* may be argued that § 1910.23(c)(1) should be interpreted to apply only to elevated work-

ing spaces, 4 feet or [sic] above ground level, which are designed primarily for the operation of machinery and equipment and which require employee presence on a predictable and regular basis; and not to spaces where only occasional maintenance or repair work is performed. . . ." [Emphasis supplied]

Nevertheless he felt himself "constrained" to hold otherwise by the Commission's decision in *General Electric (1)* which, as earlier noted, gave the "broadest possible meaning to the term 'platform'" (ALJ 25, 244a).

But there was no reason for Judge Cronin to feel "constrained" to uphold the citation. For *Arizona* has not been overruled; nor has the broad construction of the word "platform" expounded in *General Electric (1)* been consistently applied by the Commission itself. The administrative law judges of the Commission and the Commissioners, among themselves, are sharply divided on the proper and lawful scope of the platform standards.

General Electric (1) involved the surface of a product being manufactured on which employees are required to work. The product there was a stator frame which is a large component part of a turbine generator. In an opinion authored by Commissioner Cleary and joined in by Chairman Moran, the Commission reversed the ALJ and held that a product in process of manufacture on which employees are required to work is a "platform" as that term is defined in the OSHA standards. Commissioner Van Namee dissented from this holding. Agreeing with the ALJ's rationale, he reasoned:

"Insofar as my colleagues would require that guardrails be erected on stator frames, I must agree with the judge's rationale. The reason is rather simple. If this Respondent is required to provide standard railings on its product because it is of such size that the employees must be on it to manufacture it, then any other employer similarly situated can also be required to erect guardrails on its product while it is being manufactured. For example, this rule will require the erection of guardrails on the wings, tail assemblies and fuselages of large aircraft being manufactured. Other equally monstrous modifications of product design can be easily imagined. Nevertheless, this is the result my colleagues achieve by construing the term 'platform' to include an item being manufactured so as to bring it within 29 C.F.R. 1910.23(c)(1)." [CCH 1974-1975 OSHD ¶ 19567 at p. 23,378.]

The Commission, in a subsequent case which was decided after a change in its membership, refused to follow its holding in *General Electric (1)* concerning the definition of the word "platform." *Allis-Chalmers Corp.*, OSHRC Docket No. 5210, CCH 1975-1976 OSHD ¶ 20666 (1976). It held that a citation charging a violation of § 1910.23(c)(1) for failure to provide guardrails for power transformers upon which men were working should be vacated because the surface of a product being manufactured is not a "platform" within the meaning of that standard. While Commissioner Cleary adhered to the interpretation contained in his lead opinion in *General Electric (1)*, Commissioner Moran shifted his position and adopted a view similar to that of the dissenting Commissioner in that

earlier case. Chairman Barnako agreed with the principle that the surface of a product being manufactured is not a "platform," but refused to join in Commissioner Moran's "restrictive definition" of that term,¹³ which was as follows:

"Although the evidence establishes that respondent's employees used the transformer tops as 'working space[s],' we conclude that the mere use of a structure as such does not establish that it is a platform. The definition also indicates that the words 'work space' refer to such things as a balcony or platform 'for the operation of machinery or equipment.' In my opinion, this specific language restricts the definition of 'platform' to a structure that is erected to accomplish work that is being performed. This construction is especially pertinent in those instances where, as here, the structure upon whose surface work is being performed is in the process of being assembled or tested. Work atop transformers while constructing and testing them cannot be considered to be the erection of a structure 'for operation of machinery or equipment.'" [CCH 1975-1976 OSHD at p. 24,750]

Notwithstanding the Commission's obvious movement away from an over-broad definition of the term "platform," the Secretary in two recent cases involving GE has persisted in the discredited view that any elevation more than 4 feet off the ground on which employees may work is a "platform." *General Electric Company*, OSHRC Docket No. 76-2879, CCH 1977-1978 OSHD ¶ 22114 (1977); *General Electric Company*, OSHRC Docket No. 76-3524, Oct. 3, 1977

¹³ Chairman Barnako, it might be noted, did not offer his own definition of that term.

(ALJ Weil). In No. 76-2879 the Secretary charged GE with violating § 1910.23(c)(1) because two employees were working on a large cast turbine shell which stood more than 7 feet off the ground. Citing *Allis-Chalmers*, the ALJ there vacated the citation, concluding that "the surface of a product while it is being manufactured is not a platform as defined in 1910.21(a)(4)." (Chairman Cleary has directed review (now pending) on whether the turbine castings were platforms.) In No. 76-3524, involving a stator frame, the citation was also vacated by the ALJ on the same ground.

That not every area where employees may be required to work is a "platform" was recognized in *Kidets, Inc.*, OSHRC Docket No. 2670, CCH 1973-1974 OSHD ¶ 17041 (1973), where it was held that a storage area 9 feet above the ground did not constitute a "work space."¹⁴ *But see California Rotogravure Co.*, OSHRC Docket No. 688, CCH 1974-1975 OSHD ¶ 19240 (1975) (divided Commission deemed the storage space there a "platform"), *petition for review docketed*, No. 75-1743 (9th Cir. Mar. 27, 1975). The principle recognized in *Kidets* was again recognized in *Union Carbide Grafto, Inc.*, OSHRC Docket No. 7368, CCH 1974-1975 OSHD ¶ 19531 (1975) where no violation of § 1910.23(c)(1) was even alleged in a case involving employees who were permitted to work atop bundles of graphite electrodes 13½ feet from the floor without any fall protection. Instead the employer was cited for an unsafe condition under the general duty clause of the Act (§ 5(a)(1)).

¹⁴ It is also evident from OSHA Field Information Memoranda Nos. 74-53 and 74-84 which caution against the application of the platform guarding standard to "metal pouring platforms" and "petroleum loading racks" on which employees may work.

The only two cases referred to by Chairman Barnako in his opinion in the instant case do not support the proposition for which they were cited, namely, that the Commission had indicated *prior* to the inspection in this case that guard-rails are required in circumstances where maintenance work is required on the top of ovens which are a part of an employer's production operation (RC 11, 208a). The *Ventre Packing Co.* case does not deal with ovens or, indeed, with the top of any piece of equipment which serves the same functions as does the oven top herein. It deals, instead with an 8 to 9 foot high extension of a walk-in cooler, the unguarded top of which was used as a *storage space*. The holding in the case was that the storage space was *not* a platform since there was no proof of its use as a work space. The *dicta* that it might have become a platform if employees had used it as a work space was disputed by Chairman Moran in his concurring opinion.

The *Weyerhaeuser Co.* decision relied on by Chairman Barnako was decided on January 13, 1977, more than two years *after* the inspection in this case. It is clearly distinguishable, moreover, since the top surface of the dryer there involved was mounted by an employee at least once or twice *every* week on a *regular* basis. The question for review was not the definition of the term "platform" but whether the ALJ had erred in not finding that the employee was exposed to a fall hazard.

The Company's position in the case at bar, we submit, is supported by the plain meaning of the term "platform," as it is used in the industrial setting,¹⁵ as well as by the

¹⁵ It should be noted in this regard that neither GE nor the Union viewed the entire oven top as a "platform" requiring railings around its entire perimeter. The Union merely saw one small

Commission's decisions in *Allis-Chalmers, Arizona* and the most recent *General Electric* cases. The broad and strained construction of the term "platform" applied below in this case is at odds with any fair reading of the standards.

The Secretary of Labor, who promulgated the standards here involved, cannot be heard to complain that the employer has not read into them that which he has not written but which he is now attempting to impose by an overbroad interpretation. A plain reading of those standards does not support that interpretation. This is especially so here where the Commission's own position has been notably marked by a total lack both of clarity and of consistency in application.¹⁶

POINT II

The cited standard is impermissibly and unenforceably vague as applied to the bake oven herein.

Due process requires that statutes and regulations must be sufficiently specific to give those subject to them fair warning of the conduct prohibited or required. This elementary principle often has been applied in criminal cases.

area as a "catwalk" and the Company as a good faith gesture railed that area. Further, the OSHA Compliance Officer believed that an employer in good faith could determine that the oven top was not a platform.

¹⁶ Certainly no deference need be afforded the Commission's interpretation since it is not of "long standing," *Brenan v. OSHRC (Gerosa, Inc.)*, 491 F.2d 1340, 1344 (2d Cir. 1974). Nor should the Court defer to the Secretary's views since his proffered interpretation is patently "unreasonable" and has not been "consistently applied." *Langer Roofing & Sheet Metal, Inc. v. Secretary*, 524 F.2d 1337, 1339 (7th Cir. 1975). See also, *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-45 (1976) where the Supreme Court refused to afford deference to EEOC regulations where they were in conflict with earlier interpretations by the same agency.

See, e.g., *Connally v. General Construction Co.*, 269 U.S. 385 (1926); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952). Where a statute is so vague that persons of common intelligence must guess at its meaning and differ as to its application, it does not meet minimal due process standards. *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221-22 (1914); *Collins v. Kentucky*, 234 U.S. 634, 638 (1914).

While no OSHA case has reached the United States Supreme Court on this question, the several circuit courts which have been presented with the problem of interpreting OSHA standards have insisted that fair and adequate notice to employers of what is required of them in order to comply with the OSHA standards is essential if those standards are to be enforceable. In *Brennan v. OSHRC and Santa Fe Trail Transport Co.*, 505 F.2d 869 (10th Cir. 1974), the court considered whether the phrase "near proximity" is impermissibly vague in an OSHA standard providing that:

"In the absence of an . . . hospital in near proximity to the workplace . . . a person or persons shall be adequately trained to render first aid." [29 C.F.R. § 1910.151(b)]

In reversing the Commission's decision (which had vacated the standard), the court instructed that it should have considered not only the standard's language but the conduct to which it was applied. Thus the Court stated:

"The Commission made no effort to apply the standard to the facts of the proceeding before it. Instead it considered the problem as an abstraction of which it did not approve." [505 F.2d at 872-73]

The court ruled that the correct test to be applied in such cases is as follows: Was the application of the standard reasonable "in the light of conduct to which it is applied?" 505 F.2d at 872, quoting *United States v. National Dairy Corp.*, 372 U.S. 29, 36 (1962).

This "as applied" test was held to be the proper criterion in decisions of at least three other circuits. *Ryder Truck Lines, Inc. v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974); *McLean Trucking Co. v. OSHRC*, 503 F.2d 8, 11 (4th Cir. 1974); *Brennan v. Smoke-Craft, Inc.*, 530 F.2d 843 (9th Cir. 1976).

In *Ryder* the Fifth Circuit enforced an OSHA protective equipment standard. That same standard, however, did not pass muster under the facts in *Cape & Vineyard Division v. OSHRC*, 512 F.2d 1148 (1st Cir. 1975). There the First Circuit vacated the citation and, citing *Ryder Truck* as authority, explained:

"A regulation without ascertainable standards, like this one, does not provide constitutionally adequate warning to an employer unless read to penalize only conduct unacceptable in light of common understanding and experience of those working in industry."

The Commission itself later adopted and applied this same criterion in holding that the protective equipment standard did not require the wearing of wire mesh gloves by retail meatcutters. *Grand Union Co.*, OSHRC Docket Nos. 7533 and 7031, 20 OSHRC 663, CCH 1975-1976 OSHD ¶ 20107 (1975). Substantial weight was given by the Commission to the employer's and union's views as to the custom and experience in the industry.

In closer focus and in direct bearing on the record here are the decisions of the Fifth and Seventh Circuits rejecting the Secretary's attempts to have a standard almost identical to the one here (§ 1910.500(d)(1))—dealing with the guarding of open-sided floors and platforms)¹⁷ broadly construed to include flat roofs. Both courts concluded that the Secretary's interpretation was unreasonable and did not give employers proper notice of the proscribed conduct. *Langer Roofing & Sheet Metal, Inc. v. Secretary*, 524 F.2d 1337 (7th Cir. 1975); *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645 (5th Cir. 1976).

In *Langer* the court refused to defer to the Secretary's broad interpretation of the standard:

"Unlike Humpty Dumpty,³ the Secretary may not give a word whatever meaning he chooses, and while we would defer to any reasonable interpretation on his part, we are convinced that the interpretation he advances here is unreasonable.

"³ 'When *I* use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.'

'The question is,' said Alice, 'whether you *can* make words mean so many different things.'

"The question is,' said Humpty Dumpty, 'which is to be master—that's all.'" Lewis Carroll, *Through the Looking-Glass*, Chapter 6. [540 F.2d at 1339]

The Seventh Circuit suggested in *Langer* that if employees working on a flat roof required protection from the possibility of a fall from the unguarded edge, the Secretary should utilize the

¹⁷ This is the construction industry's counterpart of § 1910.23 (c)(1), the standard here involved.

"machinery [he has] available to amend the section in question or to promulgate an entirely new section that would lay the matter to rest." [*Id.*]

Accordingly, the court dismissed the citations.

The Fifth Circuit in *Diamond Roofing* agreed with the Seventh Circuit, both on the resolution that a "flat roof" is not an "open-sided floor or platform," and on the principle that the responsibility for promulgation and enforcement of reasonably clear standards lies with the Secretary of Labor. To the Secretary's contention there that the regulations should be "liberally construed to give broad coverage," a belief shared by the Secretary in the case herein, the court retorted:

"We recognize that OSHA was enacted by Congress for the purpose stated by the respondents. Nonetheless, the Secretary as enforcer of the Act has the responsibility to state with ascertainable certainty what is meant by the standards he has promulgated.

.

Even if the distinction between an open-sided roof and an open-sided floor does not make safety sense, it is the regulation as written which must bear the blame." [528 F.2d at 649-50]

As in *Langer Roofing*, the citation was vacated.

The Ninth Circuit's decision in *Hoffman Construction Co. v. OSHRC*, 546 F.2d 281 (1976) provides further support for the proposition that standards will not be tolerated when they fail to provide guidance as to what kind of conduct gives rise to liability. At issue in *Hoffman* was the application of 29 C.F.R. § 1926.28(a) which on its face

alluded to the existence of express indications elsewhere in the regulations of when the use of personal safety equipment was necessary. In concluding that the regulation as it then read "created no specific hazard, a violation of which would give rise to liability," the panel stated:

"As an abstract proposition, workmen situated 40 to 50 feet above the ground are probably 'exposed to a hazardous condition' absent other safety devices . . . But nothing in the many subsections of Part 1926 adds to the reader's general intuition that workmen exposed to a height hazard need some protection." [*Id.* at 283]

The theme common to these decisions is that an employer need not speculate as to the scope of a specific standard or be subject to interpretations thereof which are at odds with its plain meaning and with the common understanding and experience of those working in the industry. Unless and until remedial action is undertaken by the Secretary in his "rule-making" capacity, citations issued under such vague standards have been and should be vacated.

Section 1910.23(c)(1), as applied to the facts in this case, is just such a standard. Its provisions are no less objectional on due process grounds when applied to the top surface of the bake oven here, than were the provisions of its counterpart in the construction industry when applied to flat roofs. Neither gave reasonable and fair notice to the employer that the cited area was covered.¹⁸

¹⁸ As mentioned previously, the Second Circuit in *General Electric (1)* noted that "the Byzantine pattern of OSHA standards" covering the railing of platforms and scaffolds leaves "room for increased clarity of definitions." 540 F.2d at 70, n.2. The Secretary apparently also believes that there is need for clarity in this area for he has, toward that end, proposed revised standards for

The Secretary's interpretation of the platform guarding standard in this case certainly is not borne out either by the standard as written or as read in the context of common understanding and practice in the industry. As earlier noted, neither the Union nor GE believed that the oven top was a platform requiring railing on all exposed sides (p. 18, n.15, *supra*). And the compliance officer, himself, testified that an employer in good faith could very well construe the cited standard as not applying to the top surface of the bake oven in question (Tr. 1036-37, 71a-72a).

For the foregoing reasons, the cited standard as applied to the bake oven herein should be deemed impermissibly vague and the citation based thereon, accordingly, should be vacated.

POINT III

The Secretary has failed to sustain his burden of proving a violation of the cited standard within the six-month limitations period.

Section 9(c) of the Occupational Safety and Health Act, 29 U.S.C. § 658(c), provides:

"No citation may be issued under this section after the expiration of six months following the occurrence of any violation."

Working-Walking Surfaces (29 C.F.R. §§ 1910.21-1910.32) which were published in the Federal Register on September 6, 1973 (38 F.R. 172, pp. 2430 *et seq.*). Because the comments received on the proposed revisions were so extensive and they so emphasized the need for an intensive and extensive review of the entire subpart as well as for a new comprehensive approach, the Secretary withdrew his earlier proposals and adopted a new procedure to revise completely the entire subpart (see Federal Register of April 23, 1976, 41 F.R. 17100).

On its face, a cited violation must be vacated unless the Secretary has established employee exposure to the cited hazard within the prescribed six-month period. ALJ Osterman so held when he vacated a citation because the Secretary had failed to determine when workers had last been at the scene of the alleged violation. *General Telephone Co. of Ohio*, OSHRC Docket No. 3393, CCH 1973-74 OSHD ¶ 17301 (1974). *Accord*, *Niagara Mohawk Power Corp.*, OSHRC Docket No. 76-3325, CCH 1977-1978 OSHD ¶ 21982 (1977) (general duty clause violation vacated on statute of limitations grounds); *Yelvington Welding Service*, OSHRC Docket No. 15958, CCH 1975-1976 OSHD ¶ 20432 (1976) (Commission review ordered February 17, 1976) (two citations vacated on statute of limitations grounds).

The Second Circuit in *General Electric (1)*, recognizing that employee exposure within the citable six-month period is one of the requisite elements of a violation which must be proved by the Secretary, reversed the majority decision of the Review Commission and vacated the platform guarding citation there under review. The Court concluded that there

“simply is no evidence that the platform was used without guardrails during the preceding six months, much less that it was used during that period at a height of more than four feet, as specified in the standard.” [540 F.2d at 70]

In the case at bar, as in *General Electric (1)*, there simply is no evidence of actual employee exposure to a fall hazard within the six-months limitations period. The ALJ concluded in this regard (ALJ 26, 245a):

"No maintenance employees were observed on the oven top at the time of inspection and, with the exception involving the installation of the 'catwalk' railing in August 1974,¹⁹ there is no proof of an employee's actual presence near the motors during the six-month period prior to the issuance of the citation on November 18, 1974."

Unlike both the Commission and this Court in *General Electric (1)*, however, he proceeded to reach the issue of potential exposure, finding that the employees' potential exposure to the hazard area was "constant." Citing this Court's decision in *Brennan v. OSHRC and Underhill Construction Corp.*, 513 F.2d 1032 (2d Cir. 1975), the ALJ concluded that such potential exposure was sufficient to defeat the statute of limitations defense. We submit that *Underhill Construction* is readily distinguishable.

The pertinent issue raised in that case, involving a multiple employer construction site, was "whether there must be proof both of the existence of a hazard attributable to an employer, and direct exposure to the hazard by the employees of *that* employer" (emphasis in original). 513 F.2d at 1036. The Court's analysis of case law there related to decisions in which a violation was found only where employees of the cited employer were directly affected by non-compliance. The panel also conceded that language in sup-

¹⁹ The employee exposure which occurred when the partial railing was erected along the alleged "catwalk" may not be relied upon to make out a violation of the OSHA standards. Thus in *Fluor Engineers & Constructors, Inc.*, OSHRC Docket No. 76-77, CCH 1976-1977 OSHD ¶ 20972 (1976), the ALJ vacated the citation for an unguarded runway because the only employees exposed to the hazardous condition were assigned the task of installing the required guardrails.

port of this view could be found in OSHA's general duty clause which states that an employer's duty runs to *his* employees. Nevertheless, the Court found this restrictive interpretation unwarranted in light of the broad, preventive purpose of the Act to assure, so far as possible, every working man and woman in the Nation safe and healthful working conditions.

In the instant case the allocation of employer responsibility at a multiple employer worksite is not in issue. Nor was the statute of limitations defense here involved at issue in *Underhill Construction*.

Even were the cited standard applicable, the mere fact that the top of the bake oven was only partially railed did not, according to the testimony of the OSHA compliance officer who conducted the inspection herein, constitute a citable violation. For he testified that no standard railings were required at all to comply with the cited standard inasmuch as the use of safety belts would have satisfied the requirements of § 1910.23(c)(1) (Tr. 1003-05, 1008, 53a-55a, 58a). *Underhill Construction* involved static situations which were inherently unsafe. There was no need for additional acts or omissions by employees to create the hazard. But here the oven top could only present a possible safety hazard when an employee actually went up there and was exposed to a fall hazard without having the protection of *either* a standard railing *or* a safety belt. Accordingly, the partially unguarded bake oven top constitutes, at most, a non-static situation which is not inherently hazardous, but only may become so when an employee actually ascends to the top and works thereon in the unrailed area without wearing a safety belt.

We submit that extending the application of *Underhill Construction* to a statute of limitations there involved, would be tantamount to reading (c) almost entirely out of the Act. No such result intended by this Court or by Congress when it enacted that section.

Inasmuch as no violation was proven by the Secretary within the six-months limitation period, the citation here under review should be vacated.

CONCLUSION

For the foregoing reasons, the portion of the Commission's decision and order here under review should be set aside and the citation of violation therein upheld should be vacated.

Dated: New York, New York
October 18, 1977

Respectfully submitted,

ARANOW BRODSKY BOHLINGER
BENETAR & EINHORN
Attorneys for Petitioner
469 Fifth Avenue
New York, New York 10017
Tel. No.: 212-889-1470

DAVID L. BENETAR
STANLEY SCHAIR
ROLAND C. RADICE
EDWARD J. CUMMINGS, JR.
MARK H. LEEDS



STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Joseph Boselli , being duly sworn, deposes
and says, that on the 18 day of Oct 1977 , at 11 o'clock

A.M. he served the annexed Petitioner's Brief No. 77-4137 in Re:
General Electric Co vs. Occupational Safety & Health Review
Commission

upon 1. Carin A. Clauss
2. Allen Sachsel

Esq(s) , Attorney(s)

for Respondent

by depositing 3 true copies

thereof in a Post Office Box regularly maintained by the Government
of the United States and under the care of the Postmaster of the
City of New York at Village Station, New York, N. Y. 10014, enclosed
in a securely closed wrapper with the postage thereon prepaid, ad-
dressed to said attorney(s) at (his/their) office

1. Solicitor of Labor
U.S. Dept of Labor
200 Constitution Ave., NW
Washington, D.C. 20210

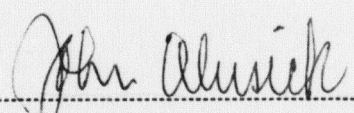
2. U.S. Dept of Justice
Civil Div., Appellate Sec.
10th & Pennsylvania Ave., NW
Washington, D.C. 20530

that being the address designated in the last papers served herein by
the said attorney.

Sworn to before me this 18th

day of October

19 77


JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
Commission Expires March 30, 1978